BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

OPENING COMMENTS OF
CSX TRANSPORTATION, INC.

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Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Paul A. Hemmersbaugh
Donald H. Smith
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for CSX Transportation, Inc.

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CSX Transportation, Inc. ("CSXT") respectfully submits these comments in response to the Notice served by the Surface Transportation Board on January 11, 2011, as modified on February 4, 2011.

INTRODUCTORY STATEMENT AND EXECUTIVE SUMMARY

In this proceeding, the Board seeks to explore, (i) "the current state of competition in the railroad industry" and (ii) the "possible policy alternatives to facilitate more competition, where appropriate."[1] CSXT urges the Board to tread very cautiously—with an eye to today's competitive surface transportation marketplace, the reliance interests of all stakeholders, the national transportation goals, the policy successes of the Staggers Act, and the law of unintended consequences. Change to the current "competitive access" regulations and related rules and policies is entirely unwarranted. Worse, such change could disrupt the productive and successful policy balance that Congress and this agency accomplished in the Staggers Act, ICCTA, and decades of implementing regulations, rules, and decisions. Since the Staggers Act, the Interstate Commerce Commission ("ICC") and this Board have worked diligently—and successfully—to

[1] Notice, *Competition in the Railroad Industry*, STB Ex Parte 705, at 1 (served Jan. 11, 2011).

implement the congressional mandate to allow "to the maximum extent possible, competition and the demand for services to establish reasonable rates," and "to minimize the need for Federal regulatory control." 49 U.S.C. § 10101. There is no warrant in fact or law for the Board to depart from this sound regulatory course.

Competition in the Surface Transportation Marketplace

The Board's exploration of transportation competition regulation must begin with this reality: railroads in the United States operate in a highly competitive surface transportation market, one in which motor carriers enjoy a market share that is six times greater than that maintained by rail carriers.[2] It is a marketplace where railroads aggressively compete head-to-head with truck, other rail, water, and pipelines.[3] The robust competition and the incentives of surface transportation markets—facilitated by sound regulatory policies—have driven the innovation, productivity, service, safety and private reinvestment gains enjoyed by railroads and shippers alike over the last thirty years.[4]

Reasonable Reliance and Investment-Backed Expectations

With respect to segment rates, the Supreme Court established controlling law in *Great Northern*, in 1935. Concerning forced access, *Midtec*, in 1986, established the governing legal requirements. For decades, Congress, rail carriers, shippers, communities, and investors have acted in reliance upon these and other settled rail regulatory rules and policies.

[2] *See* Section II.A., *citing inter alia, Exemption from Regulation - Boxcar Traffic*, 367 I.CC 425 (1983); *Rail*

Congress itself has relied on the current regulatory scheme. When Congress passed ICCTA in 1995, it changed much of then-existing law, re-enacted statutory provisions and principles it wished to maintain, and *kept in place* certain existing agency interpretations and applications.[5] The rules and regulations at issue in this proceeding were well known to Congress when it passed ICCTA. Indeed, Congress considered several proposals to change those rules. Crucially, Congress rejected those proposals and re-enacted relevant law without change.

Since ICCTA, there have been no fewer than seventeen separate bills introduced to Congress seeking to overrule or abrogate rules at issue in this proceeding. And Congress has held numerous hearings regarding these same issues. In every session of Congress since 1995, however, the end result has been the same: Congress has uniformly rejected proposed changes to those policies. Thus, by uniformly rejecting proposed statutory changes over the last fifteen years, Congress has approved of and ratified the Board's access and routing rules and regulation. Any change to settled regulatory policy concerning forced access—which Congress has ratified and relied upon—may be changed only by Congress.

CSXT and other rail carriers have necessarily relied on the established, settled regulatory scheme in making investments in their rail system, many of which are long term investments with large sunk costs. Railroad reliance is manifested in their acquisition, rationalization, and use of real property; in their design, construction, and maintenance of the infrastructure; in their carefully-planned network architecture and routing protocols; in their locomotive, car, and other asset acquisitions and leases; and in their hiring, training, and personnel deployment. Substantially changing the rules would strand many of those investments made in reasonable reliance on existing regulation. The rail industry has made extraordinary reinvestments back into its operations—approximately $480 billion—in reliance on the established Staggers

[5] *See* section III.A.2.

regulatory environment. Such investments might well have gone elsewhere, if rail carriers operated in an environment, or had the expectation of a regulatory environment, where competitors could readily access and use those carriers' private property and assets.

Other stakeholders have also relied upon the current regulatory structure and rules. Some rail infrastructure and equipment investments are the result of community and government requests and initiatives, including joint public-private projects, achieved through mutual efforts and funding. Each public-private partnership is the result of lengthy negotiations, rigorous evaluations of current needs and comparisons of estimated return on investment, and strategic projections. Unanticipated changes to settled regulatory rules, policies, and structure would jeopardize much of the work and resources that communities and rail carriers have invested in reliance on that established regulatory system.

The same is true for many shippers who have selected rail as their preferred mode of transportation. Shippers that have invested their own resources in rail facilities and equipment did so based upon the reasonable expectation that the current regulatory scheme would be stable and not subject to significant change.[6] Last year alone, CSXT customers leveraged the economic and environmental benefits of CSXT's network, by committing to 130 new or expanded facilities—which will generate approximately 5200 new jobs—on CSXT's rail lines. In addition, investors, lenders, and insurers have all relied on the current rules in making investment decisions that are critical to the industry's health.

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[6] *See, e.g.,* Comments by United States Gypsum Company, *Review of Commodity, Boxcar, and TOFC/COFC Exemption*, STB Ex Parte 704 (filed Jan. 26, 2011), at 3-4 (describing the significant, post-Staggers rail investments that U.S. Gypsum has made at manufacturing plants in excess of $100 million, and that such investments were made in reliance on the current regulatory scheme; warning that "[w]e cannot afford to have the 'rules' changed and risk that over time these investments will diminish in value"); Comments by Hub Group, Inc., STB Ex Parte No. 704 (filed Jan. 31, 2011), at 1 ("Hub Group believes we can best meet our goal of providing cost-effective, safe and on-time service for our customers without government interference in our relationship with the railroads."); Comments by J.B. Hunt Transport Inc., STB Ex Parte No. 704 (filed Jan. 31, 2011), at 1 (explaining that J.B. Hunt moved to rail intermodal services to improve innovation, efficiency and service for its customers; stating "[w]e do not want unnecessary regulation and government intervention to be the rule. It should be the exception to the rule. We urge the STB to keep the regulatory situation as it is.").

All of these stakeholders have relied on the current regulatory scheme, and any change of the kind contemplated in the notice would do great damage to the investments of effort, time, and money they have entrusted to rail transportation.

Post-Staggers Act Regulatory Policies Are a Continuing Success Story

By nearly any measure, the current regulatory system has been a remarkable and resounding success over the last thirty years. Rail rates today, adjusted for inflation, are *55% less* than their pre-Staggers Act levels. Rail carrier productivity has skyrocketed—rail productivity *rose 172%* from 1980 to 2009, compared to just 15% in the comparable period preceding the Staggers Act. Rail freight volumes have essentially *doubled* on a ton-mile basis since 1980. Rail carriers have *reduced* the train accident rate *by 76%*, while the rail employee injury rate has fallen *by 82%.*

CSXT's performance likewise has reflected those gains, capped by its best-ever performance in 2010 in safety, operating income and operating ratio. CSXT posted its safest year in 2010, part of its consistent, continuous improvement toward reducing and its ultimate goal of eliminating employee injuries, and train accidents. Injuries, for example, have declined more than 50% in the past five years to a record frequency index of 1.01 injuries per 200,000 man hours. Train accidents have steadily been reduced to 2.28 per million train miles.

Today's Economic and Transportation Environment Strongly Favor Staying the Course

In today's environment, with an economy striving to recover from the worst recession in generations, railroads are poised to play a pivotal role in moving the country forward. The U.S. Department of Commerce estimates that every $1 spent on investment in the freight railroads creates $3 in economic output. The industry projects a record $12 billion in capital expenditures in 2011, including $2 billion by CSXT alone. Such a reinvestment is a stimulus to the economy as it means more capacity, more efficiency, better service, and more jobs. Indeed, each $1 billion of rail investment creates 20,000 jobs.[7] Railroads plan to hire more workers in 2011, adding to the over 180,000 railroad employees currently employed, and who are among America's most highly compensated workers.[8]

Changing the rules that all stakeholders have relied upon threatens to unravel the progress made to date and to disappoint the great expectations the country has for rail. In the current regulatory landscape, total U.S. freight shipments are forecasted to rise from 16.9 billion tons in 2010 to 27.1 billion tons in 2040—a 61% increase. And that project assumes rail carriers simply maintain current market share. Policymakers at all levels of government, however, increasingly expect railroads to shift *more* freight off of congested and capacity-constrained public highways. CSXT is doing everything it can to *increase* its transportation market share and capacity, not simply maintain it. Regulatory changes that upset settled expectations of rail carriers and their customers, and create instability will make meeting these challenges much more difficult.

Changing existing rules and regulations governing forced access, prescribed routing, and segment routes and rates would also contravene Congress' goal of promoting a rail transportation system that allows carriers "to earn adequate revenues, as determined by the Board." 49 USC § 10101(c). The industry has clearly not achieved long term revenue adequacy by the Board's standards—much less by any standard that would allow for replacement of the network in the normal course—and it makes little sense to make progress toward that goal more difficult to accomplish.

CSXT anticipates that the arguments that some shippers will submit to the Board in this proceeding will be the same arguments that have been debated, year after year, in Congress. For

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[7] *See* Ass'n of Am. R.R., *America's Freight Railroads: Supporting American Jobs, Moving the American Economy*, at 2 (Mar. 2011), *available at* http://www.aar.org/~/media/aar/communications/railroadsjobs_final%20_3_.ashx.

[8] *See* Ass'n of Am. R.R., *Great Expectations 2011: Freight Rail's Role in U.S. Economic Recovery*, at 10 (2011) *available at* http://www.aar.org/~/media/aar/GreatExpectations/GreatExpectations2011.ashx.

good reason, Congress has consistently chosen not to act to change the rules and policies under review here—those balanced policies are working as Congress intends. There has been no change in relevant circumstance since the adoption of current regulations that could justify substantial modification of the regulations under consideration in this proceeding. If a re-ordering of national priorities for the railroad transportation network is to be undertaken, it should be done only by Congress—not by the Board. Indeed, the Board itself has long recognized its role as an executive agency—not a legislative body—and has appropriately deferred to Congress's primary role in establishing the scope of economic regulation of the rail industry. With respect to changes in regulation of forced access, for example, the Board has unequivocally rejected an "open access regulatory scheme for the railroad industry," holding that "open access ... is not provided for in the statute that the Board currently administers, and thus, in our view, is a matter more appropriately debated in Congress."[9]

As the Board and countless others have often recognized, the Staggers Act has facilitated remarkable achievements in rail productivity, volume, and safety, which in turn have generated enhanced service and lower rates for shippers. Proponents of substantial change to the regulatory regime that fostered and sustains these result must bear a heavy burden to demonstrate that such change is justified and appropriate, and that the overall benefits of such change would outweigh their costs to rail carriers, their customers, and the public. CSXT's following comments further explore and explain the compelling case for maintaining the current, successful regulations and policies concerning forced access and switching and prescribed routing.

[9] *See* STB Fin. Docket No. 32760 (Sub-No. 26), *Union Pac. Corp. – Control and Merger – Southern Pac. Rail Corp. [Houston/Gulf Coast Oversight]*, Decision No. 10, at 2 (served December 21, 1998) (emphasis added).

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INTRODUCTION

CSXT endorses the comments filed by the Association of American Railroads ("*AAR Comments*"). CSXT files these additional comments to discuss, *inter alia*, (i) the continuing success of the regulatory reforms of the Staggers Act, including the forced access rules and standards established by the ICC and approved by Congress in ICCTA; (ii) that surface transportation markets (especially in the eastern United States) have become *more* competitive, not less, in the years since the STB last reviewed its rules governing forced access to rail carrier facilities; (iii) to explain that rail carriers and shippers have relied on the established and settled regulatory regime to make investments and structure their businesses, and emphasize that regulatory changes making forced access more freely available would lead to reduced capital investment, constrained capacity, and deteriorating rail service; and (iv) to discuss how current law constrains the Board's authority to change the sound and balanced access and routing policies it has painstakingly developed over the course of several decades.

The issues raised by the Board's Notice are very broad, and the potential consequences are far-reaching. Changes to access and routing regulations and other regulatory policies at issue could fundamentally alter the competitive structure of the U.S. rail industry. For example, unnecessarily forcing railroads to share their privately-owned-and-financed infrastructure and facilities with competitors could significantly undermine rail carriers' ability to engage in differential pricing, a keystone of the post-Staggers Act regulatory reform that has been uniformly recognized as essential to the long term health of the rail freight industry. Widespread forced access could prevent railroads from attaining the statutorily mandated goal of long term revenue adequacy, and would adversely affect private investment in the rail industry, thereby impairing railroads' ability to continue to meet the nation's growing rail transportation needs.

The doubt and uncertainty that would accompany such regulatory upheaval would further inhibit private investment.

The negative effects of increased regulatory intervention in rail transportation markets would not be confined to rail carriers. Regulatory changes making forced access more readily available to shippers seeking to use such market intervention to impose lower rates could be disastrous for the economic health and vitality of the rail industry and for the interests of many rail shippers who depend on efficient, reliable service. While forced access might temporarily benefit some shippers, it would simultaneously harm other shippers and consumers. Ultimately, increased forced access would reduce the ability of carriers to make the long term investments necessary to maintain and improve their systems and service, thereby harming all shippers and their customers.

I. THE STB'S CURRENT RULES GOVERNING BOTTLENECKS AND FORCED ACCESS HAVE BEEN APPROVED BY THE COURTS AND RATIFIED BY CONGRESS, AND ARE PRESUMPTIVELY APPROPRIATE.

The Board's Notice addresses two general areas of rail regulation. *First*, the Notice seeks comments on the rules governing "bottleneck" rate issues, which arise when more than one railroad serves a portion of the route from an origin to a destination, but where a portion of the route is "served by only one rail carrier." *See* Notice at 3. *Second*, the Notice requests comments on the rules governing "competitive access," including "mandated reciprocal switching, terminal use, or trackage rights." *Id.* at 5.[10] This section discusses the development

[10] The Board sometimes uses the terms "competitive access" and "forced" or "mandated" access interchangeably. *See, e.g.*, *Notice* at 2, 4, 5. CSXT believes the term "forced access" more accurately describes circumstances when a rail carrier is required by a regulatory order to share its privately-owned rail lines, facilities, or equipment with another railroad. The term "competitive access," on the other hand, might be applied to voluntary market-based arrangements between competing carriers, or to pro-competitive merger conditions. *See infra* at IV. In these comments, CSXT generally uses the term "forced access" to refer to competitive access required by a regulatory order (except where otherwise required by context).

of current rules and law governing those issues, and the strong presumption favoring maintenance of those rules and the rail system investment and improvements they have fostered.

A. The Rules and Policies Under Review Are the Product of Careful and Painstaking Balancing of Policies and Interests Based on Extensive Input From Shippers, Carriers, and Other Interested Parties.

The Board's current rules governing bottleneck rate issues and forced access are the product of extensive regulatory proceedings, followed by judicial review and approval. In particular, the bottleneck rules involved three separate proceedings that the Board consolidated for adjudication of common issues, after obtaining comments from interested parties, including shippers and rail carriers. The Board issued a decision, and a subsequent clarification, both of which ultimately were upheld on judicial review, after five years of litigation. *See Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059 (1996) ("*Bottleneck I*"), *clarified*, 2 S.T.B. 235 (1997) ("*Bottleneck II*"), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

The rules governing forced access (including forced switching and forced terminal access) were the product of lengthy negotiations between interested parties and extensive agency proceedings. The resulting rules were affirmed in multiple appeals. *See Intramodal Rail Competition,* 1 I.C.C. 2d 822 (1985), *aff'd sub nom. Baltimore Gas & Elec. Co. v. United States,* 817 F.2d 108 (D.C. Cir. 1987) ("*Baltimore Gas*"); *Midtec Paper Corp. v. Chicago & Nw. Transp. Co.,* 3 I.C.C. 2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States,* 857 F.2d 1487 (D.C. Cir. 1988). After passage of the Staggers Act, the Interstate Commerce Commission convened a conference of interested parties, including the AAR and major shipper groups, who negotiated, agreed upon, and jointly proposed forced access rules. Following a notice-and-comment rulemaking in which the ICC received more than 100 comments, the agency ultimately adopted regulations substantially similar to the negotiated proposal sponsored by the AAR and shipper groups. *See Baltimore Gas,* 817 F.2d at 113. These regulations were upheld on judicial review. *Id.* The ICC's application of the rules to both terminal access and forced switching also received judicial approval in *Midtec Paper Corp. v. United States,* 857 F.2d 1487 (1988).

In a subsequent review of its forced access rules in Ex Parte No. 575, *Review of Rail Access & Competition Issues,* 3 S.T.B. 92 (1998), the Board did not revise those rules. More recently, the Board commissioned an independent study by economic consultants Christensen Associates, Inc., to examine rail competition issues, and received public comments on that study and a 2009 update. After examining and considering those analyses and comments, the Board closed those dockets without further action. *See* Ex Parte No. 680, *Study of Competition in the Freight Railroad Industry,* (served Nov. 6, 2008); Ex Parte No. 680 (Sub-No. 1), *Supplemental Report on Capacity & Infrastructure Investment,* (served Apr. 8, 2009); Notice at 3 n.3.

B. Carriers, Shippers, Communities, and Investors Have Acted in Reliance on Existing Regulatory Rules and Policies.

The Board's current access and routing rules have been followed and relied upon by industry participants for decades. As the Board knows, railroading is one of the most capital-intensive industries, and continuing long term capital investment is vital to maintaining and improving the U.S. rail network. Such continuing investment is particularly critical today, when freight traffic demand is projected to increase substantially in the coming years and decades, and policymakers seek to shift more of that traffic to rail. Investors rely on settled rules and law to make investment decisions that are critical to the industry's financial health, and to its ability to serve anticipated demand growth effectively. Railroads and shippers alike also rely upon the Board's rules governing bottlenecks and forced access in rate and contract negotiations, in acquiring equipment and making other capital investments and expenditures, and in many other business and investment decisions. Thus, the current rules have engendered substantial reliance interests and investment-backed expectations. Reopening these long-settled issues could lead to years of litigation before the Board and on appeal, creating doubt and uncertainty, upsetting settled expectations, and consuming substantial resources better spent elsewhere.

C. There is a Strong Legal Presumption Against Changing Rules and Policies That Have Been Adopted by the Agency, Affirmed by the Courts, and Ratified by Congress.

The Notice seeks public comment on a number of important Board regulations and settled policies, including the bottleneck and forced access rules. Changing these rules after decades of adherence would not only be unwise; it would also be a reversal of longstanding precedent and of the Board's long-settled regulatory policies, and practices. As the Supreme Court has cautioned, "the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course." *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) ("*State Farm*"). A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." *Id.* at 41-42 (*citing Atchison, T. & Santa Fe Ry. v. Wichita Bd. of Trade,* 412 U. S. 800, 807-808 (1973)). In other words, there is "at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Id.* at 42. Accordingly, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.*.

Although agencies are given latitude to adapt their rules to changing circumstances, the "presumption from which judicial review should start" is "*against* changes in current policy that are not justified by the rulemaking record." *Id.* (emphasis in original); *see also FCC v. Fox Television Stations, Inc.,* 129 S.Ct. 1800, 1810-11 (2009) (although an agency's change of course is not subject to a "heightened standard" of review under the Administrative Procedure Act, "the agency must show that there are good reasons for the new policy").

In *Fox Television,* the Supreme Court noted that an agency "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," but admonished that "[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* at 1811. The Court added, "[i]t would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.*

With respect to the issues raised in this informational proceeding, the Board's "settled course of behavior" over many years embodies its "informed judgment" that the current rules governing bottleneck rate issues and forced access "will carry out the policies committed to it by Congress," and creates "at least a presumption that those policies will be carried out best if the settled rule is adhered to." *See State Farm,* 463 U.S. at 41-42. The Board's longstanding precedent also establishes a presumption "*against* changes in current policy that are not justified by the rulemaking record." *Id.* at 42. It would be arbitrary and capricious for the Board to ignore or contradict its prior factual findings, or to disregard "facts and circumstances that underlay or were engendered by [its] prior policy," without providing a reasoned explanation and detailed justification for the change. *Fox Television,* 129 S.Ct. at 1811.[11]

[11] The Board has long acknowledged it is not authorized to require "open access" to railroad facilities—any such forced access proposals may only be addressed by Congress. In the UP/SP Merger proceedings, the Board rejected an "open access regulatory scheme for the railroad industry," holding that "open access ... is not provided for in the statute that the Board currently administers, and thus, in our view, is a matter more appropriately debated

Moreover, Congress itself ratified most of the rules, decisions, and policies at issue in this proceeding, when it enacted the ICC Termination Act without changing existing court and agency decisions implementing relevant provisions of the Interstate Commerce Act. An administrative agency does not have the power to materially change its rules and decisions if Congress has approved of the previous interpretation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The Supreme Court has long held that when Congress is aware of existing judicial or administrative interpretations of statutory provisions, and then re-enacts those provisions without relevant change, Congress is presumed to have ratified those interpretations as correct. *See, e.g. id.*; *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986); *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 783 n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); *United States v. G. Falk & Bros*, 204 U.S. 143, 151 (1907).

In *Brown & Williamson*, for example, the Supreme Court held that the FDA was not free to change its ruling that it lacked authority to regulate tobacco products, because Congress had "effectively ratified the FDA's previous position" by enacting tobacco-specific legislation "against the background of the FDA repeatedly and consistently asserting that it lacks

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in Congress." STB Finance Docket No. 32760 (Sub-No. 26), *Union Pac. Corp.—Control and Merger—S. Pac. Rail Corp. [Houston/Gulf Coast Oversight]*, Decision No. 10, at 2 (STB served December 21, 1998) (emphasis added). The relevant statutory provisions have not changed in the intervening years, and the Board still does not have authority to impose widespread forced access. Similarly, as the Board previously advised Congress, changes to forced access rules "raise basic policy issues—concerning the appropriate role of competition, differential pricing, and how railroads earn revenues and structure their services—*that are more appropriately resolved by Congress than by an administrative agency.*" *See* Letter from Linda Morgan, Chairman, to Hon. John McCain and Hon. Kay Bailey Hutchison (dated December 21, 1998) at 4 (emphasis added). As Chairman Morgan noted, changes in the competitive access rules could force railroads to cut costs by "shedding unprofitable lines and reducing new investment in infrastructure," leaving "a smaller rail system that would serve fewer shippers" with more selectively provided service. *Id.* at 5 & n.2; *accord* Notice at 7 ("a loss of revenue could lead to less capital investment, constraining capacity and deteriorating service for future traffic").

jurisdiction . . . to regulate tobacco products as customarily marketed." 529 U.S. 120, 155-56. Thus, while implementing agencies generally have the authority to make reasonable changes to their interpretation of a statute so long as Congress has not spoken on the question, they lose that power when Congress acts to adopt the agency's interpretation. When Congress has ratified an application or interpretation of statutes it has enacted, implementing agencies such as the Board may not overrule or materially change those laws except in response to further congressional action to change the law. *See, e.g., Square D,* 476 U.S. 409; *see also* III.A to III.C, *infra.*

Nearly every rule and policy on which the Board has solicited comment was in place *prior to* Congress's comprehensive review and *overhaul of the governing statutes in ICCTA.*[12] The administrative and judicial interpretations of the relevant laws at issue in the present proceeding (including rules and decisions governing forced terminal access, forced interchange, and forced "reciprocal" switching; carriers' long-haul rights; through routes and rates and the *Great Northern* line of cases; and the *Midtec* and *BG&E* decisions) were established and well-known to Congress at the time it passed ICCTA.[13] That statute, which substantially revised much of the existing Interstate Commerce Act, *re-enacted* all of the relevant statutory provisions, and did not overrule or abrogate then-existing administrative and judicial interpretations of those provisions. Thus, the Board may not substantially change those rules, policies, and

[12] The single partial exception was the Board's synthesis of existing law in the *Bottleneck* decisions, issued shortly after the passage of ICCTA. As discussed below, however, most of the *Bottleneck* decisions and rules were compelled by statutes, longstanding Supreme Court precedents, and agency rules that long pre-dated ICCTA. *See* III.A – III.C, *infra.* Indeed, with the arguable exception of the "contract exception," the bottleneck rules were simply applications of established binding law and did not announce new policies, rules, or regulations. *See generally Bottleneck I,* 1 S.T.B. 1059 (1996), *clarified by Bottleneck II,* 2 S.T.B. 235 (1997). Even the contract exception was based on the Board's interpretation and application of a statutory provision enacted in the Staggers Act sixteen years earlier. *See id.*; *see also* 49 U.S.C. § 10709(c).

[13] Some of the rules and applications of the law (*e.g.,* the *Great Northern* rule) pre-dated the Staggers Act and other significant overall revisions of the Interstate Commerce Act, and hence have been repeatedly ratified by multiple Acts of Congress over the course of several decades.

interpretations of the law – ratified by Congress – unless Congress first acts to change the law. *See Brown & Williamson*, 529 U.S. 120; *Square D*, 476 U.S. 409, 420.

Further cementing the conclusion that Congress has ratified and approved of existing rules and decisions concerning forced interchange, forced access, bottleneck rates and other matters at issue in this proceeding is a compelling legislative fact: in the years since the passage of ICCTA, Congress has repeatedly and consistently refused to adopt proposed legislation that would have altered those rules, including the rules of *Midtec* and the *Bottleneck* cases. Over that fourteen-year period, Congress has considered and rejected at least sixteen separate bills seeking to overrule or abrogate the very rules and applications of the law at issue in this proceeding.[14] During the same period, Congress has also held numerous hearings concerning these issues and proposals to change the law. The one constant in all of this legislative examination and investigation has been the result: Congress has uniformly refused to overrule the sound policies and applications of the law established by the Board, the ICC, and the federal courts.

Such an overwhelming legislative record strongly supports the conclusion that Congress approves of existing rail access rules and policies, and does not believe changes are warranted or appropriate. As the Supreme Court has held, congressional refusal to overrule agency interpretation and application of a statute is "evidence of the reasonableness of that construction,

[14] *See* Surface Transportation Board Reauthorization Act of 2009, S. 2889, § 303 (2009); Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 104 (2007); Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 104 (2007); Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 5; Railroad Competition Act of 2006, S. 2921, 109th Cong., § 104 (2006); Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005); Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 5 (2003); Railroad Competition Act of 2003, S. 919, 108th Cong., § 5 (2003); Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 104 (2003); Railroad Competition Act of 2001, S. 1103, 107th Cong., § 103 (2001); Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 104 (2001); Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 7 (1999); Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 7 (1999); Surface Transportation Board Reauthorization Act of 1999, H.R. 3163, 106th Cong., § 6 (1999); Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 104 (1999); Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 12 (1999).

particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *See United States v. Rutherford*, 442 U.S. 544, 554, n. 10; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("once an agency's statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned"). Courts have also found congressional acquiescence in an agency interpretation where – as here – Congress has repeatedly failed to act on legislation specifically aimed at reversing that interpretation. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983); *Canada Packers, Ltd. v. Atchison, T. & Santa Fe Ry. Co.*, 385 U.S. 182, 184 (1966) (rejecting challenge to *Great Northern* joint through rate rule, citing the "longstanding construction of the statute by both the [ICC] and this Court," and holding that fact that "Congress, which could easily change the rule, has not yet seen fit to intervene" supported ICC's "long-standing construction of the statute").

In light of the extensive administrative history and judicial approval of the current rules and policies governing bottleneck rate issues and forced access; congressional ratification of those rules and consistent congressional rejection of legislation designed to change those rules; and investment-backed expectations generated by those settled rules and policies, it would be unwise, unreasonable, and inappropriate for the Board to propose significant changes to these rules. Moreover, CSXT anticipates that the record before the Board in this proceeding will not support substantial changes in the current rules, and will be insufficient to overcome the strong presumption in favor of the Board's current settled policies.

[redacted]

II. THERE IS NO BASIS FOR SWEEPING REGULATORY CHANGE

A. Surface Transportation Markets In The United States Are Highly Competitive.

Since the enactment of the Staggers Act, surface transportation markets in the United States have become increasingly competitive. Railroads are subject to pervasive and robust competition from trucks, water carriers, and other transportation modes. The ICC relied in part on findings of pervasive competition from trucks in granting a number of exemptions from regulation.[15] More recently, a study by the Federal Highway Administration showed that in 2009, trucks handled 67 percent of surface freight tonnage, compared to only 10 percent for railroads, and 5 percent for water carriers.[16] Freight railroads' market share is higher when measured in ton-miles, but competition from other modes remains intense. Competition from water carriers (operating on federally-subsidized waterways) is particularly significant in important bulk commodity markets.[17]

Focusing narrowly on rail-to-rail competition, studies conducted by government agencies have consistently shown that the rail transportation market is generally competitive. For example, a report issued by the Government Accountability Office in 2006 said that changes in the railroad industry since 1980 "are widely viewed as positive," and reaffirmed the "widespread consensus" that both the rail industry and rail shippers have benefited from the "strongly positive overall effect" of the Staggers Act, including substantial industry-wide rail rate decreases during overall industry-wide rail rates declined by 20 percent from 1985 through 2004, *without* accounting for inflation (meaning that inflation-adjusted real rail rates declined by even more than 20 percent during this time period). *Id.* at 11-12. Rates for most commodities declined over the 20-year period, "with coal rates dropping the most sharply by 35 percent." *Id.* at 13.

The GAO stated that some "[c]oncerns about competition and captivity in the industry remain because traffic is concentrated in fewer railroads." *Id.* at 9.[18] Nonetheless, GAO said that its analysis indicated that the extent of shipper "captivity" to Class I railroads appeared to be dropping. *GAO Report* at 13; *id.* at 27 ("the overall extent of captivity appears to be dropping in the freight railroad industry"). GAO also noted that more railroad traffic is traveling on routes with access to more than one Class I railroad. *Id.* at 28 ("overall industry tonnage with access to more than one Class I railroad appears to have increased"). CSXT believes that GAO's measure of "captivity" was flawed by its failure to include competitive rail service provided by non-Class I carriers. Importantly, as GAO expressly acknowledged, its narrow rail "captivity" assessment failed entirely to consider competition from other modes or multi-modal competition (e.g. rail-truck transload competition): "[T]his analysis considers only competition among rail carriers and does not examine competitive options offered by rail and other transportation alternatives such as trucks and barges." *GAO Report* at 30. Nor did the GAO analysis consider product or geographic competition. Despite the limitations of the analysis, GAO's conclusion that shipper "captivity" to Class I railroads appears to be decreasing indicates that direct rail-to-rail competition among Class I carriers has been *increasing,* not decreasing, in recent years.

[18] GAO's assertion overlooked the fact that *no shipper* has lost competitive rail service as a result of any merger or consolidation approved by the ICC or STB in recent decades, because the agency consistently has imposed protective conditions (such as trackage rights or forced access) to remedy any loss of competition that otherwise would have occurred. *See infra* II.B.

In response to a GAO recommendation, the Board also commissioned an independent study by Christensen Associates to examine rail competition issues. Like the *GAO Report*, the Christensen study found that "both railroads and their customers benefited" from the regulatory reforms embodied in the Staggers Act. *See* Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry,* at ES-1 (November 2009) ("*Christensen Study*"). As the *Christensen Study* said (at ES-1):

> The U.S. freight railroad industry has undergone a remarkable transformation since 1980 when Congress passed the Staggers Rail Act.... The deregulation of the railroad industry ushered in increased market flexibility, competitive and differential rates for rail service, and a climate open to innovation. In the years following the passage of the Staggers Act, the railroad industry experienced dramatic reductions in costs and increased productivity, which yielded higher returns for carriers and lower inflation-adjusted rates for shippers.

The *Christensen Study* noted that, while the number of Class I railroads has declined since the Staggers Act, the total number of railroads has increased from about 490 in the mid-1980s to 559 in 2009. *Id.* at ES-8. Moreover, regional and short line railroads own or operate an increasing proportion of the nation's railroad infrastructure, with the number of miles of track owned by Class I railroads declining by 27 percent between 1987 and 2006. Similarly, the proportion of total industry miles operated by Class I railroads has fallen from over 80 percent of the industry totals in the 1980s to about 70 percent today, as the number of smaller railroads has increased significantly over this period. *Id.* at ES-9.

The *Christensen Study* also generally confirmed the *GAO Report*'s finding that overall railroad rates generally have declined in the post-Staggers Act period, although rates did move somewhat higher from 2005-2008. But the *Christensen Study* also found that these rate increases were driven by fluctuating fuel prices and other costs and did not appear to reflect a greater exercise of railroad market power over captive shippers. Specifically, an update to the study published in 2010 said, "[t]rends in input price and productivity growth are generally consistent with the pattern of rate changes. In 2007 and 2008, input prices continued to increase faster than productivity growth, resulting in unit cost increases [driven by] increases in fuel prices." *Christensen Update*, at ES-i. The *Christensen Update* also found that "[a]lthough 2009 rate information is preliminary, it suggests that overall railroad rates decreased in that year." *Id.* The update also found that the rail industry's "marginal cost has been increasing at a faster average annual rate than railroad revenue per ton-mile. Consequently, *the measure of railroad market power has been decreasing*." *Id.* (emphasis added). In other words, the *Christensen Update* found that rail rate increases in 2007-08 reflected higher fuel prices and other costs, not the exercise of market power. In addition, the update found that both rail rates and market power were declining in 2009.

The *GAO Report* and the *Christensen Study* confirm that surface transportation markets are generally competitive, that shippers have benefited from overall declines in rail rates since the Staggers Act, and that railroads are not generally exercising increased market power over shippers. Thus, these independent studies provide no support for any changes in the Board's current rules governing bottleneck rate issues and forced access.

B. Rail Carrier Mergers Have Not Substantially Reduced Competition.

Parties seeking re-regulation of the rail industry often assert that the consolidation of the industry since the Staggers Act, and the resulting reduction in the number of Class I carriers, have reduced or eliminated competition and left shippers with no competitive alternatives. *See* Notice at 3 (citing claims that "increased consolidation in the Class I railroad sector," among other factors, as "suggest[ing] that it is time for the Board to consider the issues of competition and access further").

These claims are baseless. As the Board knows, in every rail merger and consolidation proceeding in recent decades, the ICC and STB consistently have imposed conditions to preserve two-railroad competition for every shipper who otherwise would have lost competitive rail service. In other words, while rail mergers and consolidations have reduced the total number of Class I railroads in the United States, no shipper has lost competitive rail service as a result.[19]

Moreover, in most rail mergers, the pro-competitive benefits of the approved transaction outweighed any resulting competitive harm, as the ICC and STB have found in approving these transactions, and in subsequent oversight proceedings. *See, e.g.,* STB Finance Docket No. 32760 (Sub-No. 21), *Union Pac./S. Pac. Merger,[General Oversight]* (STB served Dec. 20, 2001) (concluding 5-year oversight process; finding that the merger "has resulted in strengthened competition for 2-to-1 shippers, 3-to-2 shippers, shippers of key commodities affected by the merger, and shippers in every rail corridor and region affected by the merger"); *see also* 49 C.F.R. §1180.1, "General Policy Statement For Merger Or Control Of At Least Two Class I Railroads."

In addition to the Board's adoption of protective conditions enhancing direct rail-to-rail competition, rail mergers and voluntary inter-carrier alliances have also helped rail carriers become more effective competitors with other rail carriers and with other modes of transportation, by allowing more efficient single-line and coordinated rail service.

[19] *See, e.g., Burlington N., et al.– Merger–Santa Fe Pac. Corp.,* 10 I.C.C.2d 661, 675-679 (1995), *aff'd sub nom. W. Res., Inc., et al. v. STB,* 109 F.3d 782 (D.C. Cir. 1997) (imposing conditions adopting terms of negotiated settlement with shipper group); *Union Pac./S. Pac. Merger,* 1 S.T.B. 233, 387-393 (1996), *aff'd sub nom. W. Coal Traffic League v. STB,* 169 F.3d 775 (D.C. Cir. 1999) (discussing appropriate conditions to remedy loss of competition at "2-to-1" points); *CSX Corp., et al. — Control — Conrail Inc., et al.,* 3 S.T.B. 196 (1998), *aff'd sub nom. Erie-Niagara Rail Steering Comm. v. STB,* 247 F.3d 437 (2d Cir. 2001) (discussing pro-competitive effects of transaction; imposing conditions including terms of negotiated settlement).

C. The CSX/NS/Conrail Transaction Substantially Increased Head-To-Head Rail Competition In The Eastern United States.

Before CSXT and Norfolk Southern ("NS") jointly acquired control of Conrail, Conrail faced no Class I rail competition throughout much of its service area. *See* 3 S.T.B. at 247. As a result of the transaction, CSXT and NS now directly compete with each other in important markets where there was no direct rail-to-rail competition before. *Id.* These markets include the Northern New Jersey portion of the New York metropolitan area; Southern New Jersey and Philadelphia; Detroit; the area served by the Monongahela Railroad; and the Ashtabula Harbor. *Id.* The total amount of rail traffic exposed to head-to-head railroad competition was estimated at $700 million per year. *Id.* at 247-248.

In addition, the Board found, the transaction would permit both CSX and NS to compete more effectively with motor carriers (the "dominant mode of freight transportation for most commodities throughout the East"), by offering new and efficient single-line service to thousands of shippers that received only joint-line service before, leading to improved service and reduced transit times for thousands of shippers. *Id.* at 248.

In light of these facts, the Board found that the proposed transaction would result in a pro-competitive restructuring of rail service throughout much of the Eastern United States. *Id.* at 247. The Board imposed certain competitive conditions to protect, in a "handful of instances," the shippers whose rail options would otherwise be reduced from two to one at a particular location. *Id.* at 248. With these conditions, the Board found that the transaction would result in no instances of significant competitive harm, and would significantly increase competition for many shippers. Therefore, the Board found, "the clear impact of this [Conrail] transaction is to create a substantial increase in rail-to-rail competition, and not a reduction."

Notably, the Conrail transaction was approved by the Board in July 1998, long after the ICC's adoption of its forced access rules (in 1985), and after the STB's adoption of the bottleneck rules (in 1996-1997). To the extent that the Conrail transaction could be considered "changed circumstances" after the adoption of those rules, the change is in the direction of more head-to-head rail competition in the eastern United States, not less.

D. Improved Financial Health of Railroads Is Not A Basis For Re-regulation

The policies embodied in the STB's current rules for interchange and forced access have allowed railroads to improve their financial performance, but have not yet allowed them to achieve the goal of long term, sustained revenue adequacy.[20] Improving the financial health of the rail industry was a key goal of the Staggers Act.[21] The goal of "revenue adequacy" was not intended to be a temporary fix, but a long term, sustained condition that, in concert with the other goals of the Act, allows demand, competition, and markets to determine the best allocation of resources and rail services.[22] Thus, continued improvement in, and maintenance of, the rail industry's financial health is a statutory goal which must be pursued, not a problem to be solved.

The improved financial performance of the rail industry has yielded tangible benefits for shippers, including continued private investment and capital expenditures by railroads. America's freight railroads operate on privately-owned infrastructure that is built, maintained, and paid for primarily by private investment. From 1980 to 2010, freight railroads reinvested

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[20] *See* 49 U.S.C. § 10704(a); Ex Parte No. 552 (Sub-No. 14), *Railroad Revenue Adequacy—2009 Determination* (STB served Nov. 10, 2010) (finding that no Class I railroad is revenue adequate for the year 2009; none of the Class I railroads achieved a rate of return equal to or greater than the Board's calculation of the average cost of capital for the freight rail industry).

[21] 49 U.S.C. §§ 10101(3), (5), (6); *See GAO Report* at 8 (Staggers Act "recognized the need for railroads to use demand based differential pricing to promote a healthy rail industry and enable it to raise sufficient revenues to operate, maintain and, if necessary, expand the system in a deregulated environment").

[22] *See,e.g.,*49 U.S.C. §§ 10101(1)-(5).

approximately $480 billion of their own funds to purchase and maintain locomotives, freight cars, tracks, bridges, tunnels and other infrastructure.[23] As the following table illustrates, the average U.S. manufacturer spends about 3 percent of revenue on capital expenditures, while the comparable figure for U.S. freight railroads is nearly 17 percent, or more than five times greater.

RRs Are Far More Capital Intensive Than Other Industries

Capital Spending as % of Revenue	
Average all manufacturing	3%
Food	2%
Petroleum & coal products	3%
Machinery	3%
Motor vehicles & parts	3%
Wood products.	3%
Fabricated metal products.	3%
Chemicals	4%
Plastics & rubber products	4%
Paper	4%
Computer & electr. products	5%
Electric utilities	13%
Freight railroads	17%

Source: Census Bureau, AAR, EEI

- Five times more capital intensive than average U.S..manufacturer.
- Eight times more equipment and other assets per employee than average U.S. manufacturer.

These huge investments and capital expenditures, facilitated by the Staggers Act and the Board's current rules, have enabled CSXT and other U.S. freight railroads to maintain and expand their capacity, while providing reliable and efficient rail service to shippers.

[23] According the AAR, rail carriers re-invest approximately 40 cents out of every revenue dollar they earn. Ass'n of Am. R.R., *An Overview of America's Freight Railroads* (March 2011).

A signature capital project is CSXT's $842 million National Gateway, a public-private partnership with six states and the District of Columbia to build a double-stack cleared rail corridor from Mid Atlantic seaports and consumption centers to consumers and manufacturing centers in the Midwest. The National Gateway features a $175 million intermodal terminal in Northwest Ohio that is the benchmark for such facilities. That new intermodal facility alone employs more than 200 full-time employees, and will serve as the transfer point for hundreds of thousands of freight containers annually. The new facility uses cutting-edge technologies and "green" design, and is one of the country's most environmentally friendly and technologically-advanced intermodal terminals. As many as 10,000 jobs will be created during the initial construction phase of the National Gateway, and 50,000 more over a 30-year period.

As discussed in the next section, the continued ability of freight rail carriers to maintain this level of capital investment will depend in significant part on regulatory stability, including the continuation of the settled rail regulation rules and policies under review in this proceeding.

E. Changing Forced Access Rules Will Stifle Rail Investment.

Changes to the rules and policies under examination would almost certainly reduce rail revenues. Plainly, the loss of these revenues would make the rail industry less attractive to investors. Moreover, the uncertainty resulting from the contemplated regulatory changes will create risks that will further inhibit rail investment. In addition, any regulatory changes that would require railroads to allow their competitors access to their privately-owned rail lines and facilities would drastically alter incentives for future capital investments and could seriously impair the industry's continued access to capital markets.

Rail carriers and their investors have made large, long term investments based on the existing regulatory system and the rights and responsibilities embodied in the important rules and policies under consideration in this proceeding. Carriers make capital investments and purchase and install long-lived assets based upon existing rules and law, and their expectations that sound settled policies will remain in place without substantial change. Unanticipated changes in those established rules could "strand" very substantial assets and investments reasonably made in reliance on those rules. Unreasonable or ill-considered regulatory changes and resulting investment losses would not only discourage future rail system investments, they may be unlawful. Should the Board adopt substantial changes to established rules and rights that impair the reasonable investment-backed expectations of rail carriers and their investors, it may effect a regulatory taking that would oblige the government to pay very substantial compensation. *See generally Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Penn Cent. Transp. v. New York City*, 438 U.S. 104 (1978).

Similarly, adoption of a new forced interchange, forced trackage rights, or forced terminal access regime without a prior showing of competitive injury or anti-competitive activity (as required by existing rules) might also constitute a physical taking (and/or a regulatory taking), again requiring government compensation to carriers. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1989). Forcing one carrier to give a second carrier access to, or the right to use, the first carrier's private property (such as infrastructure, facilities, or equipment) based solely on the demand of the second carrier or a shipper could constitute a *per se* physical taking. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1986); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1993).

Moreover, it is not at all clear that forced interchange or other forced access imposed simply to serve the self-interest of a particular shipper (*e.g.*, the shipper's desire to obtain lower rates or service it prefers), or a second carrier, would satisfy the threshold requirement that any government taking of private property must be for a public purpose. *See, e.g., Hawaii Housing*

Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (Fifth Amendment prohibits takings for a private purpose and such a taking is unconstitutional even if the government provides just compensation). *See generally, Kelo v. City of New London.* 545 U.S. 469, 477 (2005) ("[T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation") (*citing, inter alia, Calder v. Bull,* 3 Dall. 386, 388 (1798)).[24] Particularly given that substantial changes to forced access rules and law would also run contrary to congressional ratification of existing law and policy, such material changes should not be made, or even seriously considered, without express congressional authorization.

III. *GREAT NORTHERN,* THE *BOTTLENECK* RULES AND LIMITS ON BOARD'S AUTHORITY TO PRESCRIBE ALTERNATIVE THROUGH ROUTES.

The Board's limited power to prescribe alternative through routes and to evaluate routes or rates for segments of through routes, is narrowly circumscribed by statute, Supreme Court precedent, and congressional ratification of longstanding ICC and Board decisions and rules. Existing Board "competitive access" policies and rules—including the "Bottleneck Rule"—reasonably balance the needs and interests of carriers, shippers, consumers, and the public. As demonstrated below, not only is there no demonstrated need to disturb this careful balance by changing the Board's sound existing policies and regulation, binding law narrowly limits the Board's authority to make such changes.

[24] Under the specific facts of *Kelo*, a closely divided Supreme Court found the taking in question satisfied the public purpose requirement. That fact-specific finding does not diminish the constitutional prohibition of government taking of property for a private purpose, which has been firmly established for more than 200 years. *See id.*

A. Governing Supreme Court Law Holds That Joint Rates May Be Challenged Only On A Through Basis, And That A Carrier Is Entitled To Its Long Haul.

As the Board acknowledges in the Notice, the Supreme Court has established that "the reasonableness of a through rate established by carriers is only relevant to the shipper as to the total rate charged, and thus should be evaluated from origin to destination rather than on a segment-by-segment basis." See Notice at 6-7. Consistent with controlling Supreme Court law, the Board has correctly held that it has "only narrow authority to compel a railroad to quote a separately challengeable rate for a portion of a movement." *See id.* at 6. As discussed below, longstanding Supreme Court precedent ratified by Congress, and other limitations on the Board's power to prescribe through routes, prohibit the Board from "changing its precedent" to expand its authority to prescribe through routes. *See id.*

1. The Board Must Follow Governing Supreme Court Precedent, Which Has Long Established The Agency May Not Entertain Challenges To Rates For A Segment Of A Through Route

The Supreme Court has consistently held for at least 85 years that, in evaluating the reasonableness of a through rail rate, the agency must evaluate the entire through rate, and not the portion of the through rate that would apply to any component segment of a through movement. In 1925, the Supreme Court affirmed a decision of the ICC finding challenged through rates to be unreasonable. *See Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925) ("*Sloss-Scheffield*"). In opposition to the ICC decision, one of the defendant rail carriers who participated in the through movement argued that the "joint through rates should be treated as if they were merely a combination of the full individual rates of the several carriers, because the rates in question were in fact constructed by combining as factors the existing published proportional rates of the several carriers." *Id.* at 231. The Court rejected the argument as legally irrelevant, finding that the proper challenge was to the entire rate from origin to destination, and there was no basis for challenging the division of the rates among carriers. As the Court summarized the rule,

> [T]he initial carrier exacted the excessive joint rates on behalf of itself and of all of the connecting carriers who with it were parties to the joint through rates. The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. *The shipper's only interest is that the joint rate be reasonable as a whole.* It may be unreasonable although each of the factors of which it is constructed is reasonable. It may be reasonable although some of the factors, or of the divisions of the participants, were unreasonable.

Id. at 234 (emphasis added).

Ten years later, the Supreme Court affirmed the *Sloss-Sheffield* holding, and clarified that holding applied to any through rate, even if part of the through movement was outside the agency's jurisdiction. *See Great Northern Ry. v. Sullivan*, 294 U.S. 458 (1935) ("*Great*

Northern"). *Great Northern* involved combination rates (the sum of two proportional rates) on shipments of lignite from Canada to points in the United States. The shipments moved on a through bill of lading issued by Canadian Pacific from Alberta to the international boundary and thence over Great Northern to points in North Dakota. In a rate challenge brought by shippers, the ICC found that the Great Northern's proportional rates were unreasonable, but made no finding as to the reasonableness of the combination through rates. In fact, the shipper-complainants did not contend that the combination through rates (including the Canadian segment) were unreasonable.

The Court reversed the ICC, finding its approach to be inconsistent with the Interstate Commerce Act and with *Sloss-Sheffield*:

> [T]he Great Northern proportional [rate] cannot be applied save as it is a part of the through rate. There was a single charge which, though based on the combination rate, was precisely the same in amount as if the rate had been jointly made. As shown by our decision in [*Sloss-Sheffield,*] the division among connecting carriers of charges based on joint rates – those involved in that case were constructed out of existing proportionals – is of no concern of the shipper. *The proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate. The shipper's only interest is that the charge shall be reasonable as a whole.*

Id. at 463 (emphasis added; citations omitted).

Since the time of *Sloss-Sheffield* and *Great Northern,* the Supreme Court, federal courts of appeals, the ICC, and the Board have repeatedly affirmed the rule of law that shippers must challenge the rate for the entire through movement, and may not challenge rates for individual segments of a through movement. This rule of law is "long standing," *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry. Co.*, 385 U.S. 182, 183 (1966), and a "venerable principle of railroad rate regulation," *Union Pac. R.R. Co. v. STB,* 202 F.3d 337, 339 (D.C. Cir. 2000). Following the Staggers Act, both the ICC and the Board repeatedly recognized the continuing vitality of the

Great Northern rule, and its application to traffic moving under common carriage rates. *See, e.g., Bottleneck I,* 1 S.T.B. 1059, 1073 (1996); *Metropolitan Edison Co. v. Conrail,* 5 I.C.C.2d 385, 408 (1989) ("*MetEd*").

Over the last 85 years, the Supreme Court requirement that a shipper may challenge only the entire rate that applies to a full through route, and may not challenge a rate applying to a segment of a through route, has been followed and relied upon by numerous important decisions of the appellate courts, the ICC, the Board, and other federal agencies. *See, e.g., MidAmerican Energy Co. v. STB,* 169 F.3d 1099, 1107 (8th Cir. 1999) (*Great Northern* held "that a shipper may not recover damages based upon the carrier's portion of a rate if the carrier chooses to offer only a joint rate with another carrier, unless the entire joint rate is unreasonable") ("*MidAmerican Energy*"); *W. Res., Inc. v. STB,* 109 F.3d 782, 789 (D.C. Cir. 1997) ("Shippers . . . if charged under a joint or proportional rate, must challenge the rate for the entire through movement; they cannot challenge individual segments") (citing *Bottleneck I*, which relied on *Great Northern*); *United States v. ICC,* 198 F.2d 958, 974 (D.C. Cir. 1952) ("*Great Northern* held that the shipper could not complain of the division of the charges among the participating carriers, and . . . remarked that 'The shipper's only interest is that the charge shall be reasonable as a whole'"); *see also Big West Oil Co. v. Frontier Pipeline Co.,* 119 FERC ¶ 61,149, at PP 12, 14 (2007) ("The [D.C. Circuit has] interpreted [*Sloss-Sheffield* and *Great Northern*] as generally standing for the principle that the reasonableness of a joint rate is to be assessed as a whole rather than by reference to fewer than all of its segments. . . . The Commission [therefore] . . . must judge the reasonableness of the joint rate here as an aggregate rather than looking at the reasonableness of only some of the joint rate's parts"); *Salt River Project Agric. Improvement and Power Dist. v. Atchison, T. & Santa Fe Ry. Co.,* 356 I.C.C. 26, 34-35 (1977).

As the Board itself summarized controlling law just six years ago: "Both Supreme Court and agency precedent require that, whether examining joint rates or proportional rates, we must address the reasonableness of the through rate as a whole, rather than the reasonableness of the component parts of the through rate." *Ariz. Elec. Power Coop., Inc. v. Burlington N. and Santa Fe Ry.*, STB Docket No. 42058, Decision (served Mar. 15, 2005) ("AEPCO v. BNSF"), *available at* 2005 WL 638319, at *8 & n.18 (citing *Great Northern, Bottleneck I,* and *Union Pacific v. STB, supra*). Even more recently, in *Frontier Pipeline Co. v. FERC,* 452 F.3d 774 (D.C. Cir. 2006), the D.C. Circuit remanded a FERC order awarding reparations in a challenge to the reasonableness of joint rates of four oil pipelines because FERC had held that a joint rate could be found to be unjust and unreasonable "simply on the basis of a finding about the costs for providing service on *one* of four segments, where the Commission has denied the carrier[s] any opportunity to show that the *overall* rate did not exceed costs." *Id.* at 776 (emphasis in original).[25] The court found that FERC had failed to reconcile its finding with the Supreme Court's decisions in *Sloss-Sheffield* and *Great Northern,* and reversed and remanded the FERC decision. *Id.* at 782-783.[26]

2. Because Congress Has Ratified the *Great Northern* Rule, the Board May Not Change the Rule Absent an Act of Congress

In addition to the fact that the rule enunciated in *Great Northern* has been repeatedly affirmed and is binding Supreme Court precedent, Congress has ratified the *Great Northern* rule.

[25] Oil pipelines remain subject to regulation under the provisions of the Interstate Commerce Act that were in effect prior to October to October 1, 1977, including the requirement of Section 1(5) of the Act that rates must be just and reasonable. *Frontier Pipeline,* 452 F.3d at 776.

[26] The Court rejected the agency's attempt to distinguish *Great Northern* as a case involving combination rates based on the sum of proportional rates, rather than on the sum of local rates: "for purposes of the principle that a through rate could only be judged as an aggregate, [*Great Northern*] saw no material difference between a joint rate (*clearly* to be judged only as an aggregate) and a combination rate (by extension, also to be judged only as an aggregate)." *Id.* at 783 (emphasis in original).

Congress has taken no action to alter or overrule *Great Northern* during the more than 75 years since the Supreme Court decided the case. During the intervening period, Congress has enacted a number of major statutes that, *inter alia*, significantly changed many of the standards governing reasonable rail rates and practices. Major statutory changes in the regulation of railroads in the last three decades alone include the 4-R Act, the Staggers Rail Act of 1980, and the ICC Termination Act of 1995 ("ICCTA"). Despite Congress' repeated "careful[] reexamin[ation] of this area" it has "not see[n] fit to change" *Great Northern*'s requirement that the reasonableness of common carrier through rates may be reviewed only on an origin-to-destination through basis. *See Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986) ("*Square D*") (refusing to overrule longstanding Supreme Court interpretation of Interstate Commerce Act, largely because of Congress' failure to overrule that interpretation in the intervening 64 years). To the contrary, as a prominent member of the House Transportation and Infrastructure Committee advised the Board in the *Bottleneck* proceedings, when Congress enacted ICCTA, it "rejected proposals to alter substantively the fundamental concept of differential pricing, *including proposals to apply maximum rate regulation to separate segments of through routes.*"[27]

Because Congress has refused to change *Great Northern*'s rule concerning through rates despite numerous opportunities over the last eight decades, that rule may be revised or overruled only by Congress – not by the Board, and not even by the courts. The Supreme Court made this clear in *Square D,* which involved the issue of whether the Court should overrule its then-64-year-old decision in *Keogh v. Chicago & Nw. R. Co.,* 260 U.S. 156 (1922). *Keogh* interpreted the Interstate Commerce Act and the antitrust laws as precluding a private shipper from

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[27] Letter from Cong. Susan Molinari to Secretary Vernon A. Williams, dated October 8, 1996, and filed in STB Docket Nos. 41242, 41295, and 41626 (emphasis added).

recovering treble damages under the Sherman Act in connection with ICC-filed tariffs. In *Square D*, the Court declined to overrule *Keogh*, relying heavily on the failure of Congress to do so despite enacting other legislation which involved the applicability of antitrust laws to regulated railroads during the 60 years since *Keogh*. Despite acknowledging the possibility that *Keogh* may be "unwise as a matter of policy," the Court explained that "it nonetheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in [the Motor Carrier Act of] 1980." *Square D,* 476 U.S. at 420. The Court therefore concluded:

> the developments in the six decades since *Keogh* was decided are insufficient to overcome the *strong presumption of continued validity that adheres in the judicial interpretation of a statute*. As Justice Brandeis himself observed, a decade after his *Keogh* decision, in commenting on the presumption of stability in statutory interpretation: "*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right.... This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation." *We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention*. If there is to be an *overruling* of the *Keogh* rule, it *must come from Congress, rather than from this Court.*

Id. at 423-424 (emphasis added).

In several other contexts, the Supreme Court has affirmed the principle that, if a court or responsible agency has interpreted a statute and Congress subsequently re-enacts that statute without changing the relevant provision, Congress is presumed to have ratified that interpretation or application of the statute. *See, e.g., Fed. Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress"); *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 783, n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); *NLRB v. Bell Aerospace,* 416 U.S. 267, 275 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1964).[28]

Because Congress has not chosen to alter the holding of *Great Northern* (which has been in effect for an even longer period than was *Keogh* at the time of the *Square D* decision), the "strong presumption of continued validity" must attach to *Great Northern*'s interpretation of the Interstate Commerce Act, particularly because Congress has given "careful, intense, and sustained attention" to that area on a number of occasions. *See Square D,* 476 U.S. at 420; *Lindahl*, 470 U.S. at 783. Thus, the Board may not act on its own initiative or authority to change the longstanding requirement of *Great Northern*; only Congress may make such a change. This requirement of congressional action as prerequisite to changing the *Great Northern* rule also imposes important limitations on the Board's power to change the *Bottleneck* rules. As discussed in detail below, because the long-established and repeatedly affirmed rule of *L&N, Great Northern* and their progeny is the foundation for the *Bottleneck* rules, the Board may not change the Bottleneck rules (at least insofar as they are derived from and implement the longstanding and congressionally ratified *Great Northern* rule), without an Act of Congress changing those rules. *See* III.A.3 through III.C, *infra.*

[28] As demonstrated above, this congressional ratification rule applies with at least equal force to the other rules, policies, and decisions the Board is considering in this proceeding. All of those rules and policies pre-dated ICCTA, except the *Bottleneck* decisions and rules. And, despite careful consideration of the *Midtec* rule and other forced access rules (including proposals to overturn them), Congress enacted ICCTA without changing those interpretations. Under the law discussed in the text, Congress ratified those rules, decisions, and policies as correct when it passed ICCTA.

3. Movements with Segments Beyond the Board's Jurisdiction Have Always Been Subject to the *Great Northern* Rule

In the Notice, the Board inquires whether the *Great Northern* rule requires the Board to evaluate a through rate "when a portion of that rate includes transportation outside the Board's jurisdiction." Notice at 7. *Great Northern* itself and several subsequent Supreme Court cases demonstrate that the answer is an emphatic yes. In *Great Northern,* the complainant challenged only the proportional rates charged for the U.S. portion of an international movement originating in Canada and terminating in the United States. Despite the fact that the ICC lacked jurisdiction to prescribe a rate or route for the Canadian segment of the through movement, the Supreme Court held that the shipper was required to challenge the rate charged for the entire through route. *Great Northern,* 294 U.S. 458. Several subsequent decisions of the Supreme Court and the ICC affirmed that the ICC and the Board have authority to determine the reasonableness of an international through rate (and to award relief against the U.S. carrier participating in the route), even though the agency lacks jurisdiction over the foreign segment of the through route and could have not prescribed such a route and rate. *See, e.g., Canada Packers, Ltd. v. Atchison, T. & Santa Fe Ry.,* 383 U.S. 182, 183-184 (1966); *Lewis-Simas Jones Co. v. S. Pac. Co.,* 283 U.S. 654, 659 (1931); *News Syndicate Co. v. New York Cent. R.R. Co.,* 275 U.S. 179, 187 (1927); *Canadian Pac. Ltd. v. United States,* 379 F.Supp. 128, 132-134 & n.17 (D.D.C. 1974); *Larson Concrete Co. v. Chicago & Nw. Transp. Co.,* 367 I.C.C. 109, 112 (1982).

As the ICC aptly summarized, "[A]bundant case law has established the Commission's authority to determine the reasonableness of a joint through international rate covering transportation in the United States and an adjacent foreign country." *Nat'l Insulation Transp. Comm. v. Aberdeen & Rockfish R.R. Co.,* 365 I.C.C. 624, 626 (1982). There is thus no question that the Board has both the authority and the responsibility to evaluate the reasonableness of an entire through rate charged by connecting rail carriers, even when a portion of the through route or rate is outside the Board's rate reasonableness jurisdiction.

The Board also inquires whether the fact that some freight may be transported using multiple modes over an international route warrants a departure from the requirement that challenges to the rate for a rail through route apply only to the entire through route and not to segments of that route. *See* Notice at 7. The answer is no. First, as established above, the Board lacks the power to change the *Great Northern* rule. Only Congress may change the rule and application of the Interstate Commerce Act established and reaffirmed on numerous occasions by the Supreme Court, and approved by Congress. Regardless of whether the Board thinks conditions or circumstances have changed, it does not have the authority to change well-established law repeatedly affirmed by both the legislative and judicial branches. *See, e.g.,* III.A.2 *supra.*

Second, contrary to the Board's suggestion, multi-modal international shipments are not new. Indeed, the Supreme Court was well aware of such traffic at the time of *Great Northern,* and discussed and distinguished an international rail-ocean carrier movement from the all-rail international movement at issue. *See Great Northern,* 294 U.S. 458, 460 n.2. Discussing the difference between an international through route by rail and "inland hauls of exports or imports by sea to or from foreign countries," the Court concluded that the ICC "deals with rates applicable to inland hauls . . . and with reparation *without consideration of charges or factors attributable to transportation by sea . . .* " *Id.* (citing several ICC decisions) (emphasis added). Quoting an ICC decision at length, the Supreme Court explained that the international movement by ship was not part of the rail through route, stating in part:

> It is easy to be misled by the term 'through bill of lading,' for it implies that the originating carrier has undertaken to carry the

> traffic from point of origin to an ultimate point of destination – say, from Memphis to Liverpool. . . . The ship line is operated in physical connection with the rail line, but the rail line receives none of the ship line's earnings, makes no division of a through rate with the ship, suffers none of its loss, and takes none of its hazards. The furnishing of a through bill of lading in connection with ship-side delivery at the port of Mobile . . . does [not] carry with it any of the elements attaching to the through bill issued by a rail carrier with a rail connection.

Id. (quoting *Mobile Chamber of Comm. v. M & O. R.R. Co.*, 23 I.C.C. 417, 425-26).[29] Thus, at the time of *Great Northern*, the ICC already had precedents in place holding that the through rate rule did not apply to extra-territorial movements by non-rail modes of transportation. International movements by water were outside the purview of the ICC, and not part of a rail "through route" subject to the rule described in *Sloss-Sheffield* and refined in *Great Northern* and subsequent decisions.

Great Northern and its progeny also establish that the fact that portions of a through route may be outside the Board's prescription authority does not affect the vitality of the rule. *See, e.g., Canada Packers, Ltd. v. Atchison, T. & Santa Fe Ry. Co.*, 385 U.S. 182, 183 (1966). Similarly, the need to reconcile the authority of the ICC over intermodal transportation with the jurisdiction of foreign nations and of other federal agencies under a variety of circumstances and conditions has a very long history, and reconciliation of overlapping jurisdictions and powers has posed no insuperable obstacles to the agency's discharge of its regulatory duties. *See generally, Trailer Marine Transp. Corp. v. Federal Maritime Comm'n, et al*, 602 F.3d 379, 383-393 (D.C. Cir. 1979) (reciting history of ICC authority over rail-water through routes since 1910, finding ICC jurisdiction over such intermodal through routes – including routes that traverse international waters – but holding FMC had jurisdiction over purely water movements

[29] The ICC has long had authority to prescribe joint through routes and rates for rail-barge intermodal transportation between two points in the United States.

originating or terminating in the United States); *see also Sea-Land Service, Inc. v. Federal Maritime Comm'n*, 404 F.2d 824 (1968) (ICC, and not FMC, had jurisdiction over joint water carrier-motor carrier through rates). At least as early as 1945, the Supreme Court affirmed that the ICC had jurisdiction over intermodal traffic from a U.S. origin to a U.S. destination, even when the water portion of the movement traveled through a foreign port. *See United States v. Pennsylvania R.R. Co. et al*, 323 U.S. 612 (1945) (holding, *inter alia*, that the ICC had regulatory jurisdiction over rail carriers, motor carriers, and water carriers, and over the inter-relationship between those modes; that rail carriers are under a duty to establish through routes with connecting water carriers; and that the ICC had "the same power over interstate water-rail transportation which passes through foreign waters, as . . . it enjoys where the transit is wholly within the territorial limits of the United States.").

Thus, the Board and its predecessor have more than a century of experience with regulation of intermodal transportation, and with exercise of regulatory power and geographic and modal limits and constraints on that power. Congress established the Board, its jurisdiction, and limits on its power, with full awareness of a century of ICC and court precedents. There is no evidence that relevant conditions or the nature of transportation have changed so fundamentally since 1995 that longstanding rules and policies (including the *Great Northern* rule and the *Bottleneck* rule) have been rendered unworkable or invalid. Thus, even if the Board had authority to materially change the rules and law established in *Great Northern* (and applied in the *Bottleneck* cases) and affirmed on numerous occasions by both the Courts and Congress – which it does not – multi-modal transportation and increases in international shipments would provide no basis for such a change.

Fourth, the evolution of intermodal and international shipping does not provide any basis for changing the law concerning rail carrier through-routes and rates. The Board may not change the law governing rail through routes and rates because the overall transportation of a commodity may involve other modes. In specific instances, it is possible that questions may arise concerning the proper application of the *Great Northern* and *Bottleneck* to multi-modal or international movements under an overall "through" rate or route. That possibility, however, provides no warrant or basis for agency abrogation or alteration of rules and law governing rail through routes and rates. Moreover, any such situations should be addressed as they arise and specific, concrete facts and circumstances are brought to the Board's attention, not in the abstract.

B. The *Bottleneck* Decisions Properly Applied Governing Statutes And Supreme Court Precedents To Determine That A Bottleneck Carrier Is Not Required To Establish A Local Rate For A Bottleneck Segment.

In what have become known as the "Bottleneck Cases," the Board was presented with the question of whether shippers were entitled to break a two-carrier through route into separate component routes, one from origin to interchange, and the second (over the lines of the second carrier) from interchange to destination, and force the bottleneck carrier to provide a "local" rate for its bottleneck segment alone. *See Bottleneck I*, 1 S.T.B. 1059, 1060 (1996). Complaining shippers contended that "breaking the transportation movement into separate components and obtaining a local rate over the bottleneck segment" would allow them to obtain more competitive rates and service for the non-bottleneck segment. *Id.* at 1060. Based on a careful analysis of governing law and extensive comments submitted by all interested parties, the Board determined that a shipper "served by a bottleneck carrier may not force competition simply by seeking prescription of local rates over the bottleneck segment of its origin-to-destination movement," and dismissed the cases. *See id.* at 1068.

The Board's decision articulated several rules of law that guided and directed the outcome of the cases. Those core legal principles – which compelled the result in the *Bottleneck* cases and the so-called "Bottleneck rules" set forth in those cases – are well-grounded in statutory mandates and Supreme Court precedents that are equally binding today as they were when the Board decided the cases. First, a carrier's rate initiative is guaranteed by statute. *Bottleneck I*, 1 S.T.B. at 1064 (citing provision now codified at 49 U.S.C. 10701(c)).[30] That rate initiative gives carrier discretion to local, joint, or proportional rates. *Id.* (citing *United States v. Illinois Central R.R.*, 263 U.S. 515, 522 (1924). Second, a bottleneck carrier has statutory power

[30] Section 10701(c) guarantees a rail common carrier the right to "establish any rate for transportation or other service" it provides.

and discretion to determine which interchange (and hence which through route) it will use in responding to request for service. *Id.* That carrier is not required to open an alternative through route merely because a shipper requests a different route or interchange. *Id.* at 1065. Third, the Board may prescribe an alternative through route only if it finds statutory standards of Sections 10705(a)(1) and 10705(a)(2) are satisfied. *Id.* The Board has implemented the statutory requirements and standards through its Competitive Access Rules, which allow prescription of alternative through routes only where: (i) it is necessary to remedy or prevent anti-competitive conduct; and (ii) the criteria of Sections 10705(a) are satisfied. *Id.* at 1065-66. Summarizing this routing portion of the analysis, the Board concluded:

> Giving the shippers the routing control that they seek here would defeat the statutory provisions protecting each railroad's right to determine, at the outset, which reasonable through route it will use to respond to requests for services. . . Shippers may not unilaterally dictate the terms of service through artifices such as a request for a local rate for what is clearly a through movement. Rather, shippers dissatisfied with a railroad's response to a request for service must seek relief through the competitive access rules. . . .
>
> Simply establishing that a carrier refused to open an additional through route at the shipper's desired interchange point is not, by itself, evidence of anticompetitive conduct sufficient under those rules to warrant the prescription of that route. It has long been held that the statute and the competitive access rules neither direct nor were meant to require the government to create additional, competitive rail through routes simply upon demand.

Id. at 1065-67 (citing 49 U.S.C. § 10705(a) and *Baltimore Gas,* 817 F.2d at 114-15).

After a discussion of its competitive access rules, the Board turned to the question of whether a shipper may challenge rates charged for a segment of a through route. Because the parties agreed that the law required that joint rates "can only be reviewed as a whole," the Board focused on the question of whether shippers could challenge separately the components of a combination of proportional rates. *Id.* As the Board found, the Supreme Court's *Great Northern* decision established that a proportional rate for an interline movement may not be separately challenged. As CSXT demonstrated above, the *Great Northern* decision and rule has been affirmed repeatedly by the Supreme Court, and consistently accepted and ratified by Congress over the last century. Applying that binding law, the Board necessarily concluded it may only consider the reasonableness of the entire through rate, not a proportional rate:

> Thus, a shipper's challenge to the reasonableness of a proportional rate covering a bottleneck segment that is combined with a common carriage rate over the non-bottleneck segment must, in our view, address the reasonableness of the through rate as a whole.

Bottleneck I, 1 S.T.B. at 1073-74; *see Bottleneck II,* 2 S.T.B. at 238 ("We reaffirmed the principles of *L&N* and *Great Northern* that, when railroads establish common carriage through rates, shippers must challenge the reasonableness of the entire rate from origin to destination, and may not challenge the bottleneck segment separately.")

In *Bottleneck II*, the Board further explained its decision and its application. The Board also further explained another statutory basis for its decision, the longstanding routing protections provided to carriers. Those protections include the "right of a rail carrier not to be short-hauled" originally adopted by Congress in 1910 and now codified at 49 U.S.C. § 10705(a)(2). *See Bottleneck II,* 2 S.T.B. at 241.

On appeal, the Eighth Circuit Court of Appeals affirmed the bottleneck rules articulated in *Bottleneck I* and refined in *Bottleneck II. MidAmerican Energy*, 169 F.3d at 1099. The Court confirmed that the Board had correctly applied the law established in *Great Northern,* limiting rate challenges to rates charged for an entire through route, and not a portion or segment of that route. *Id.* at 1106. The Eighth Circuit further affirmed that the law authorizes a rail carrier to provide service "in a manner that protects its "long hauls." The Court further concluded that the express limitation of Section 10705(a)(2) allowed the Board "to order a carrier to provide service over a shorter haul than it wishes *only* if the Board first makes specific findings" that statutory exceptions to the short haul prohibition are satisfied. *MidAmerican Energy,* 169 F.3d at 1106 (emphasis added).

C. The Bottleneck Decisions Also Created A Narrow "Contract" Exception To The General Rule, Which Board Found Was Necessitated By Elimination Of Its Jurisdiction Over Contract Movements (Section 10709).

In the *Bottleneck* cases, the Board also announced an exception to the *Bottleneck* rules, allowing a shipper to force a carrier to provide a common carrier rate for a bottleneck segment of a through route if it first obtains a contract for the non-bottleneck segment of that route. *See Bottleneck II,* 2 S.T.B. 235, 238 (1997). The Board created this exception because it believed it was the only way to reconcile the through route and long-haul rights of carriers (guaranteed by the *Great Northern* and *Missouri Pacific* lines of cases and Section 10705(a)(2)) and Section 10709(c)'s elimination of the Board's jurisdiction over rail transportation under contract. *See id.*

This "contract exception" was by no means the only available way to reconcile the tension between those laws and their mandates. Indeed, *Great Northern* and its progeny suggest that a more consistent, reasonable reconciliation would allow the Board to consider the overall rate that applies to the through route, but limit the application of any rate prescription to the non-contract segment of the route. On review, however, the D.C. Circuit held that the contract exception was a permissible interpretation and reconciliation of competing statutory requirements, and upheld the Board's decision. *See Union Pac. v. STB,* 202 F.3d 337 (D.C. Cir. 2000).

None of the governing law has changed since the *Bottleneck* cases, and the Board is not empowered to change the laws established by Congress and the Supreme Court. As the Board summarized in *Bottleneck II,*

2. The Hypothetical Discussion of "Better" Routes in *Bottleneck I* Was <u>*Dicta* and Has No Precedential Effect.</u>

The *Entergy* decision stated that "[s]ome Board precedent suggests that a party may be able to obtain a route prescription under a more relaxed standard than set forth in our regulations." *Entergy,* slip op. at 7 (citing only *Bottleneck I*). That statement is both inaccurate and materially incomplete. <u>First</u>, rather than "some" precedent (or a "line of precedent") which suggest multiple decisions addressing an issue, the Board relies entirely on a stray discussion from a single case, *Bottleneck I.* <u>Second</u>, the discussion the Board references was <u>not</u> "precedent," but rather *dicta,* a speculative discussion about matters not before the Board in the *Bottleneck* cases, not decided by those cases, and therefore having no precedential effect. What the complaining shippers sought in the Bottleneck cases was prescription of a local rate over the bottleneck segment of a joint through route. *See Bottleneck I,* 1 S.T.B. at 1061. The Board held that what shippers effectively sought was routing control, which could only be sought through a request for competitive access. *See id.* at 1065-68. Because complainants sought relief only on the premise that a carrier participating in a through rate was obliged to provide local rates, they did "not address[] the requirements of the competitive access rules. . . " *Id.* at 1066. The cases before the Board did not decide any competitive access issues – let alone establish a new and undefined "better route" standard unknown to the statute or regulations and therefore its survey and discussion of competitive access principles was *dicta.*

Moreover, the Board's own express disclaimer further proves that the discussion was *dicta.* Introducing the very paragraph on which *Entergy* relies, the Board admonished: "*We cannot declare* in advance just *what must be shown to make a competitive access case justifying the prescription of a new through route.*" *Bottleneck I,* 1 S.T.B. at 1069 (emphasis added). Given all of the foregoing, this passage cannot properly be characterized as "precedent," or as "announcing" a "relaxed standard" for forced access or prescribing a through route. *Bottleneck I* did not create, or even suggest, any new standard for evaluating forced access requests. The Board should not seek to "reconcile these lines of precedent" because the short abstract discussion cited by *Entergy* is neither a "line" nor "precedent." *Cf. Entergy* at 8, n.16.

Third, *Entergy*'s elliptical summary of prior *dicta* wrenched the *Bottleneck I* hypothetical out of its narrow context, and far overstated the scope and import of that *dicta*. Contrary to *Entergy*'s suggestion, the brief hypothetical from *Bottleneck I* concerned *not* a new, less rigorous standard for evaluating competitive access requests, but rather an example of the *type of evidence* a party might present in order to attempt to satisfy existing standards established by the statute and the Board's regulations. *See Bottleneck I* at 1068-69.[31] The Board hypothesized that one way to attempt to make a competitive access case with respect to a bottleneck segment might be for a shipper to present "a transportation contract entered into for service over a non-bottleneck segment." *Id.* at 1069. The Board further hypothesized that if such a hypothetical contract contained service terms, benefits, and efficiencies that rendered service over the non-bottleneck segment "better" than the service offered by the bottleneck carrier, the shipper could use the terms of that contract in support of its request for forced access. *See id.*

Nowhere did *Bottleneck I* state that it was establishing or even suggesting a new, "more relaxed standard." To the contrary, the Board offered a hypothetical example of particular evidence – a contract with demonstrably superior terms and service – that might be used to satisfy the existing standards established in the Board's regulations and affirmed on appeal. *Id.* at 1068-69.

[31] The Board offered this hypothetical example of evidence that might be presented to meet the competitive access standards because it "perceive[d] a sense among shippers that [the competitive access rules] stacked the deck against shippers ever obtaining 'competitive access' relief." *Id.* Nowhere did the Board purport to be establishing a different or "more relaxed" standard for such relief.

Thus, *Entergy*'s characterization of a digressive paragraph from *Bottleneck I* as announcing a new, more relaxed standard for granting forced access is not only erroneous, it attempts to expand even the *dicta* well beyond its limited context. *Bottleneck I* did not hypothesize a new standard for granting forced access, it speculated that in some future case, the terms of a contract might be used as evidence in a forced access case. Significantly, the *Entergy* discussion fails to note that the *Bottleneck* hypothetical was confined to circumstances in which the complaining shipper had a *contract* for the non-bottleneck segment. *See Entergy*, slip op at 7-8.[32] Instead, *Entergy's* misreading of that isolated passage led to the erroneous conclusion that *Bottleneck I* announced, *sua sponte*, an entirely new, less rigorous standard. This distorted construction imposes a weight that the words and facts of *Bottleneck I* cannot sustain.

3. The *Dicta* in *Bottleneck I* Concerning the Use of a Transportation Contract as Evidence in an STB Proceeding is Inconsistent with the Contract Exception to the Bottleneck Rule.

The Board's suggestion that a rail transportation contract might be considered in the Board's determination of a petition for forced access is not consistent with its rationale for the contract exception to the Bottleneck rule. The *Bottleneck Cases* concluded that the statutory provision (10709(c)) excluding rail transportation contracts from "this part" of the statute meant that, despite otherwise binding law (including *Great Northern* and the Board's statutory duty to assist rail carriers to earn adequate revenues), the Board could not even "indirectly" review a rail

[32] Further confirming that the evidentiary digression in *Bottleneck I* was *dicta* without any legal effect, the hypothetical does not make sense in the context of the issues that were actually decided in the *Bottleneck* cases, including the establishment of the "contract exception" to the *Bottleneck* rule. If, as the hypothetical posits, the shipper has a contract for the non-bottleneck segment of the interline movement, then it is within the contract exception to the rule. There would be no need for the shipper to use the terms of that contract as evidence to force the bottleneck carrier to establish a local route and rate for the bottleneck segment. Because, under the contract exception, the complainant would already obtain the relief it seeks – establishment of a local rate for the bottleneck segment of the interline movement– there would be no reason to pursue a forced access case and thus no occasion to present the terms of the other carrier's contract.

transportation contract rate.[33] *Bottleneck I*, 1 STB at 1074. But if the "jurisdiction ousting" statute stripped the Board of jurisdiction to consider the terms of a contract, then by the same reasoning the Board could not consider the terms of a contract in order to prescribe competitive access under nearby sections of the same *Chapter* (107) of the same statute. See 49 U.S.C. §§ 10703, 10705(a) (statutory sections providing authority for Board's competitive access rules).

Moreover, the primary *Bottleneck* decision expressly found that Section 10709 "does not override the routing and long-haul protections afforded under Section 10705 to the non-contracting, connecting rail carrier for service over its route segment" and "was not intended to impose new regulatory obligations on non-contracting parties." *Id.* at 1069-70, n.17. It would contradict this express finding for the very same decision to use the same statute as a means to impose forced access remedies otherwise precluded by Section 10705 and implementing regulations.

4. An Indefinite "Better Route" Standard Would Be Impermissibly Subjective and Allow Arbitrary and Capricious Determinations.

In addition to all of the reasons the purported "new standard" suggested in *Entergy* does not constitute a standard at all, that undefined (non)standard would be an empty vessel that would provide no meaningful guidance as to how the Board might apply it to an actual petition for forced access. As *Entergy* itself demonstrated, the "better" route "standard" is amorphous and undefined. *See Entergy*, slip op at 11-16. As the Board acknowledged in *Entergy*, "what constitutes a better route is an issue of first impression." It was an issue of first impression for good reason: before *Entergy*, the "better route" standard for forced access was found nowhere in governing law, the Board's regulations, or its precedents. Because the new "more relaxed

[33] The "Part" of the statute referenced by Section 10709(c) is Part A, which encompasses Chapters 101 through 119 of Title 49.

standard" was mentioned for the first time in *Entergy,* the Board had no prior opportunity to establish any factors, criteria, or analytical structure to give meaning or objectivity to the term "better route." Without additional development, substance, and explanation, a "better route" standard is meaningless as a guide for reasoned, objective, and non-arbitrary determination of forced access requests.. Equally important, the fact that an alternative route is somehow subjectively deemed to be "better" (for whom and in what respect?) may in many instances have no relevance to the pro-competition policies and goals of the statute implemented by the existing standards set forth in the Board's regulations. Those standards were affirmed on appeal as an appropriate balancing of statutory policies – there is no reason for departure from those standards, and the Board has offered none, either in this proceeding or in the *Entergy* case.

Moreover, if the Board were to seek to establish a new criterion for determining requests for forced access (*e.g.*, a "better" route criterion), it would be creating a new standard that would either replace existing standards, or establish an additional alternative standard.[34] The existing standards were developed through a difficult balancing of interests and statutory requirements and policies established by Staggers, and the 4-R Act. That balance was upheld by courts of appeals in *BG&E, Midtec, MidAmerican Energy* and other decisions. Further, the competitive access standards established by the ICC and the Board, and affirmed by the federal courts were also ratified by Congress when it enacted ICCTA without changing those policies. *See supra* at I, III.A.2. Any new or alternative standard would lack that long-developed history and force of law.

[34] As demonstrated above, even if the Board were to properly develop, support, and adopt a new or alternative threshold standard for forced access, the additional standards, requirements, and limitations established by Congress and the Supreme Court (including a carrier's statutory long haul right, and the through route law established by *Great Northern*, affirmed by numerous subsequent Supreme Court and agency decisions, and ratified by Congress) must still be satisfied before the Board may grant such access. The Board's existing regulations acknowledge that, even when the "anticompetitive" act or conduct standard is satisfied, forced access may be granted only when the additional statutory requirements are also satisfied. *See* 49 C.F.R. § 1144.2.

The current court-approved and congressionally ratified standards and requirements implement the statutory directions that competition should determine rail rates and service, and that agency intervention should be limited to instances in which insufficient competition or anti-competitive conduct or conditions have been found. *See, e.g.*, 49 U.S.C. § 10101.[35] Any new criterion would have to be shown to meet those criteria equally well. Moreover, even if the Board were otherwise able to justify some new threshold standard for evaluating forced access requests, it would be required to clearly articulate and define an objective standard, what it requires, and how it would be applied. An undefined "better" route norm does not approach satisfaction of any of those minimum requirements.

IV. THE BOARD SHOULD NOT ALTER ITS CURRENT RULES TO REQUIRE FORCED TERMINAL ACCESS OR RECIPROCAL SWITCHING

A. History and Present Practice

Reciprocal switching refers to "the movement, for a fee, by one carrier of the car or cars of another," to or from points on the switching carrier's line, without participating in the line-haul movement.[36] Historically, reciprocal switching has been *voluntary* arrangements between railroads, in situations where market forces and private investment decisions made it more efficient or profitable for railroads to switch traffic for each other than to build their own

[35]In all events, the Board could not, consistent with administrative law requirements, adopt a new "better route" standard for competitive access in this proceeding. This is an informational proceeding intended to consider possible measures the Board might consider for modifying its competitive access rules, not a notice-and-comment rulemaking. *See, e.g.* STB Ex Parte No. 705, "Competition in the Railroad Industry," Notice at 5, 7 (served Jan. 11, 2011). The Board is gathering information, and has made no rule proposals. Even if this were a rulemaking, nothing in the Notice provides any suggestion that the Board is considering lower, less rigorous standards for competitive access, and certainly not that it proposed to adopt a "better route" standard.

[36] *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 1 I.C.C. 2d 362 (1985), *reconsidered,* 3 I.C.C. 2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States,* 857 F.2d 1487 (1988); *see also Vista Chemical Co. v. The Atchison T. & Santa Fe Ry.*, 5 I.C.C. 2d 331, 343 n. 2 (1989).

rail lines or facilities.[37] Indeed, the very term "reciprocal" speaks volumes about how and why carriers adopted these arrangements.[38] For example, where several railroads served a city or terminal, they sometimes established a single neutral switching or terminal company to serve all shippers in the area, instead of building duplicative rail lines and facilities. This approach avoided unnecessary capital investments and reduced operational conflicts and congestion.

Similarly, in cases in which two railroads each served a single shipper, but one railroad could do so more efficiently (for example, because of congestion, local track configuration or other operational issues), they sometimes agreed to allow one railroad to switch traffic for the other, for a fee. Other voluntary switching arrangements have involved end-to-end relationships between regional railroads that did not compete for long hauls, but found it advantageous to engage in reciprocal switching or terminal arrangements to facilitate service to customers in the area where their regional lines met.

Notably, these voluntary arrangements typically did not involve substantial expansions of a rail carrier's service area, or surrender of the value of a rail carrier's capital investment to a competitor. Rather, most voluntary reciprocal switching arrangements traditionally involved railroads that already had the ability to serve a particular shipper or area, but found it more operationally or financially effective to allow another railroad to perform the physical switching movement. Both before and after the Staggers Act, a defining attribute of reciprocal switching arrangements has been that they are voluntary. Carriers enter into such arrangements only after careful consideration, and only when each party to the arrangement conclude it is in its best

[37] *CSX Corp., et al. — Control — Conrail Inc., et al.,* 3 S.T.B. 196, 255 (1998) ("*Conrail Control*"), *aff'd sub nom. Erie-Niagara Rail Steering Comm. v. STB,* 247 F.3d 437 (2d Cir. 2001) (reciprocal switching "is generally a voluntary arrangement that carriers undertake when it is in their own best interest").

[38] As the ICC aptly explained, when a carrier or shipper seeks to compel a second carrier to switch its traffic, "[t]he term 'reciprocal switching' is a misnomer because reciprocal switching denotes reciprocity, a sharing of each other's traffic." *Midtec,* 3 I.C.C. 2d 171, 176, n.13.

interest. Forcing a carrier to use its tracks, facilities, locomotives, and employees to provide an involuntary service to a foreign carrier in order to accommodate the desires of a particular shipper would eliminate an essential defining feature of reciprocal switching—voluntariness.[39] Indeed, as the ICC recognized in its seminal *Midtec* decision, in the context of agency-ordered switching, the term "reciprocal switching" is a misnomer for what is more accurately described as "forced switching." *See Midtec Paper,* 3 I.C.C.2d 171, 176, n.13.

B. The Board's Competitive Access Regulations

The Staggers Act authorized the ICC to require railroads to enter into reciprocal switching agreements "where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." *See* 49 U.S.C. § 11102(c)(1). As previously detailed, the ICC developed the "Competitive Access Rules" based upon a joint compromise proposal of shippers and carriers. *See* I *supra.* These regulations and their application were upheld on judicial review. *See Midtec Paper Corp. v. United States,* 857 F.2d 1487 (D.C. Cir. 1988); *Baltimore Gas & Elec. v. United States,* 817 F.2d 108 (D.C. Cir. 1987).

Today, those competitive access regulations provide the standards the Board uses to evaluate requests for the prescription of through routes and joint rates under 49 U.S.C. § 10705, or impose forced switching arrangements under 49 U.S.C. § 11102(c)(1). Under these regulations, the agency may establish forced switching arrangements only where they are "necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive," and otherwise satisfy the relevant statutory criteria. 49

[39] Prior to the Staggers Act, the ICC's authority to impose mandatory reciprocal switching was, at most, unclear. *Baltimore Gas and Elec. Co..v. US,* 817 F. 2d at 113, *citing* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 67 (1980); *see Cent. States Enters., Inc. v. ICC,* 780 F.2d 664, 679 (7th Cir. 1985); *Midtec Paper Corp. v. United States,* 857 F. 2d at 1499.

C.F.R. § 1144.2(a)(1). In addition, the complaining shipper or carrier must show that it has used or would use the prescribed rate, route, or switching arrangement for a significant portion of its transportation needs or a significant amount of traffic. 49 C.F.R. § 1144.2(a)(2)(i)-(ii). In determining whether forced switching arrangements are "necessary" under these criteria, the Board considers "all relevant factors," including the applicable rates, revenues, costs, and the efficiency of the rail routes in question, including their respective operating costs. 49 C.F.R. § 1144.2(a)(1).

In a key case applying the regulations, the ICC reiterated that its inquiry (properly) focused on issues involving alleged anticompetitive conduct, and held that the "essential questions" were: (1) "whether the railroad has used its market power to extract unreasonable terms" on the movements at issue; and (2) "whether because of its monopoly position it has shown a disregard for the shipper's needs by rendering inadequate service." *Midtec Paper Corp. v. Chicago & Nw. Transp. Co.*, 3 I.C.C.2d at 181-82. The agency ruled that these standards would also be applied to requests for terminal trackage rights under former 49 U.S.C. § 11103(a) (now § 11102(a)). *Id.* at 178, 182. Since *Midtec*, and its approval on appeal by the D.C. Circuit, this agency has consistently applied these requirements to requests for forced switching access under § 11102(c)(1), and for terminal trackage rights under § 11102(a).[40]

C. Potential Changes to Regulatory Standards for Forced Competitive Access

As discussed, the Board's rules governing forced access are the product of extensive negotiations, agency proceedings, and judicial appeals. The Board's adherence to these rules for more than 25 years has established a "settled course of behavior" reflecting an "informed

[40] *See, e.g.*, ICC Finance Docket No. 31505, *Rio Grande Indus., et at - Purchase and Related Trackage Rights - Soo Line R.R. Line Between Kansas City and Chicago, IL*, (served November 13, 1989) (*Midtec* standards govern terminal trackage rights applications); *Shenango Inc. v. Pittsburgh, Chartiers & Yough. Ry. Co.*, 5 I.C.C.2d 995, 1000(1989), *affd sub nom., Shenango Inc. v. ICC*, 904 F.2d 696 (3rd Cir. 1990); STB Docket No. 41550, *Golden Cat Division of Ralston Purina Co. v. St. Louis Sw. Ry. Co.*, (STB served April 25, 1996).

judgment" that the current rules "carry out the policies committed to it by Congress," and creates "a presumption that those policies will be carried out best if the settled rule is adhered to." *See State Farm,* 463 U.S. at 41-42.

CSXT believes that significant changes to the current rules and the sound policies and balance of interests they implement are neither appropriate nor justified. Although the Notice mentioned a number of ways in which the rail industry has changed in recent years, none of these developments requires or justifies sweeping changes in the rules governing forced competitive access. For example, the Board has found that major rail mergers in the past two decades (including the UP/SP merger and the CSX/NS/Conrail transaction) have made surface transportation markets *more* competitive, not less. *See* II.C *supra.* Overall rail rates have declined substantially since the forced access rules were adopted in 1985, and agency-sponsored reports generally attribute recent upticks in rail rates to increased costs (especially rising fuel costs), not increased market power. *See GAO Report* at 13, 27; *Christensen Update* at ES-i.

CSXT re-emphasizes that the improving economic health of the railroad industry is good news, not a problem. A healthy rail industry is a benefit (to railroads, shippers and the national economy),[41] and represents progress toward a statutorily-mandated goal.[42] The governing statute requires that the Board "make an adequate and continuing effort" to assist rail carriers in earning adequate revenues. 49 U.S.C. § 10704(a)(2); *see* 49 U.S.C. § 10101(3). Given that statutory mandate, it would be irrational and unlawful to rely on the railroads' improving financial performance as a justification to alter the current rules and policy.[43]

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[41] *See Christensen Study* at ES-i.

[42] *See Christensen Study* at ES-26 ("Although the railroad industry's earnings have increased in recent years, they do not appear to be excessive from a financial market perspective").

[43] The Board's Notice (at 3) also mentions the "proliferation of a short line railroad network" and the "increased participation of rail customers in car ownership and maintenance" as potential reasons to alter the current forced

The Board should not substantially change its forced access rules and standards. Forcing railroads to share their infrastructure and facilities with competitors based on anything less than a strong showing of anticompetitive conduct or effects would adversely affect rail carriers' ability to re-invest in their systems and service and discourage further private investment in the industry, thereby impairing railroads' ability to continue to meet the nation's growing rail transportation needs. While forced access might temporarily advance the narrow self-interests of some shippers, it would simultaneously harm other shippers and consumers, and ultimately harm the freight railroad system and all shippers who use it.[44]

The Board should continue to apply the same standards to requests for forced switching and terminal access rights. The ICC, STB and reviewing courts have all held that it was appropriate and reasonable for the agency to use similar standards in determining whether to compel either type of access. *See Midtec*, 857 F.2d 1487 (D.C. Cir. 1988).[45] Moreover, when Congress enacted ICCTA, it was well aware of the agency's regulations and standards enunciated in *Midtec*, and it left those standards in place, thereby ratifying those rules. *See* I.C, III.A, *supra*. Any change to the rules and standards ratified by Congress must be left to

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access rules. But neither of these developments has deprived any shipper of competitive rail service or made the rail industry any less competitive, and neither would justify the potential regulatory changes contemplated in the Notice.

[44] *See Christensen Study* at ES-39 ("there is little room to provide significant 'rate relief' to certain groups of shippers without requiring increases in rates for other shippers or threatening the railroads' financial viability"); *Christensen Update* at ES-ii ("we reemphasize one of our original conclusions: providing significant rate relief to some shippers will likely result in rate increases for other shippers or threaten railroad financial viability").

[45] With respect to terminal trackage rights, the ICC historically required a party requesting such relief to demonstrate "some actual necessity or compelling reason" why such arrangements should be ordered, requiring a showing of "more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them." *Midtec*, 857 F.2d at 1492 (*quoting Jamestown Chamber of Commerce v. Jamestown, W. & N.R. Co.*, 195 I.C.C. 289, 291 (1933)). In *Jamestown*, the ICC said, "[w]here something substantial is to be taken away from a carrier for the sole benefit of [other private] parties, and with no corresponding benefit to the carrier, ... we are inclined to view that some actual necessity or some compelling reason must first be shown before we can find such action in the public interest." 195 I.C.C. at 293; *see Central States Enterprises, Inc. v. ICC*, 780 F.2d at 678 (ICC used similar public interest standards in joint use cases both before and after passage of the Staggers Act), (*citing* H.R. REP. NO. 1430, 96th Cong., 2d Sess. at 116-17).

Congress. Despite myriad opportunities over the intervening 15 years (including at least 16 bills proposing to change competitive access rules and overturn *Midtec*), Congress has repeatedly declined to change the law.

Changes to the regulations and policies under review in this proceeding could cause sweeping changes to the competitive structure and fiscal health of the freight rail industry in the United States. Today, due in significant part to sound, stable, market-driven regulatory policies, the American freight rail industry and the services it delivers to its customers have become the envy of the world. Substantial changes to existing regulatory policy would jeopardize that success at the very time that the nation is depending on the railroad industry to do more and more. More broadly, such changes could have very significant negative consequences – some foreseeable, others unpredictable or unintended for the nation's entire surface transportation system, and the shippers and consumers who depend on it. There is no compelling reason for the Board to contemplate such changes, and every reason to maintain the present regulatory course.

D. Determination of Appropriate Compensation for Forced Switching or Terminal Access Would Require the Development of New Standards and Methodologies.

CSXT emphasizes that it would be unwise and unlawful for the Board to change current regulatory policy and rules governing competitive access. If the Board were nonetheless to determine to impose forced access under less rigorous standards, it would be necessary to develop a reasonable and appropriate access pricing methodology that adequately compensates the burdened carrier. As the Notice recognizes, "[i]f the Board were to modify its competitive access rules, it would also need to address the access price." Notice at 7. CSXT firmly believes that there is no proper legal or factual basis to conclude that the Board's access rules should be changed. Indeed, given Congress's consistent rejection of repeated legislative initiatives designed to change the Board's competitive access rules over the last two decades, the Board lacks the authority to materially alter those established rules without congressional action changing the law. Moreover, changes making forced access more readily available could have very serious negative consequences for rail carriers, their customers, and the economy. Accordingly, the Board should not find it necessary to reach the issue of access pricing. However, because the Board has solicited comments on the issue, CSXT provides a few brief preliminary observations.

Because the Board has not had occasion to order forced access under its current rules, there is no direct Board precedent on forced access pricing.[46] Therefore, it would be necessary to conduct a full notice-and-comment rulemaking to develop and adopt a methodology for determining access prices for mandated terminal trackage rights, segment rates, or required reciprocal switching fees. CSXT submits that in any such rulemaking, the Board would be required to propose and evaluate methodologies that are based upon the sound economic principles that underlie the stand-alone cost test found in the Board's Constrained Market Pricing Guidelines for determination of maximum reasonable rates, or comparable principles such as those underlying the Efficient Component Pricing methodology.

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[46] To determine compensation terms for trackage rights imposed as conditions in merger proceedings, the Board and its predecessor have applied a three-part formula adopted in *St. Louis S.W. Ry. Compensation—Trackage Rights*, 4 I.C.C.2d 668 (1988). That formula provides that the fees paid by the trackage rights tenant include an amount sufficient to cover the variable costs incurred by the landlord as a result of the tenant's operations, the tenant's share of maintenance and operations expenses on a car-mile usage basis, and the tenant's share of an interest rental component representing return on road property investment at current market values. However, that formula would not be appropriate or sufficient to determine adequate compensation for forced access in the present context.. For one thing, it does not compensate the landlord carrier for the lost opportunity costs of the capacity that the tenant's operations would consume, nor is it clear that it would compensate the incumbent for the costs that it would face on other portions of its network as the impacts of operational interference rippled across its system. More generally, the formula for determination of compensation in a merger proceeding may not be applicable for determining just compensation for forced access, because in the merger context the carrier is voluntarily seeking a benefit (merger authorization), and if the conditions on obtaining that benefit are greater than the carrier is willing to bear, it is free to abandon the request for merger authorization. In the forced access context, the burdened carrier is not seeking such a benefit and presumably could not voluntarily decline to provide access to its property.

Critically, any such regime of access pricing would have to fully compensate the incumbent carrier – that is, the carrier whose lines or other facilities would be subject to an order of forced access – for the use of its property. And such compensation would require determination of a methodology that provided for a full and fair return on the replacement costs of the incumbent carrier's property, not depreciated historic costs.

Any approach that did not use replacement costs in determining forced access compensation would deprive the incumbent carrier of a sufficient return on the use of its property to justify replacing it – a formula for declining investment and ultimately a deteriorating rail system. Such an access pricing approach could undermine much of the progress toward rail transportation system goals over the last 30 years, and would ultimately disserve the interests of both carriers and shippers. Moreover, any forced access compensation approach that does not fully and adequately compensate the carrier whose property is taken would constitute an unconstitutional taking without just compensation. *See generally Lingle v. Chevron*, 544 U.S. 528 (2005); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1986).

In short, the development of an adequate access pricing system and methodology for new forced access rules or standards that the Board might adopt would by itself constitute a significant, complex, and difficult undertaking. Although CSXT believes that there is no justification for the Board altering its existing access rules, the Board should recognize that were it to do so, it would be essential to conduct a separate proceeding to address in detail the many complex issues associated with determining economically rational and constitutionally permissible standards for forced access compensation.

CONCLUSION

There is no sound basis in law or policy for the Board to undertake to change existing rail competition and access policies. Current rules and policy – painstakingly developed over a long period of time—are working as Congress intended. The Board should conclude this proceeding without taking any further action.

Respectfully submitted,

G. Paul Moates
Paul A. Hemmersbaugh
Donald Smith
Hanna Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Counsel for CSX Transportation, Inc.

Dated: April 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2010, I caused copies of the foregoing Opening Comments of CSX Transportation, Inc. to be served by first-class mail or more expeditious means on all Parties of Record in STB Ex Parte No. 705.

Eva Mozena Brandon